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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-770

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *National Crushed Stone Association* v. *EPA* (Pet. App. 1a-

37a) is reported at 601 F.2d 111. The opinion of the court of appeals in *Consolidation Coal Company* v. *Costle* (Pet. App. 40a-78a) is reported at 604 F.2d 239.

JURISDICTION

The judgment of the court of appeals in *National Crushed Stone Association* v. *EPA* was entered on June 18, 1979 (Pet. App. 38a-39a). The judgment in *Consolidation Coal Company* v. *Costle* was entered on June 25, 1979 (Pet. App. 79a-80a). On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 16, 1979, and on October 11, 1979, he further extended the time to and including November 15, 1979. The petition was filed on November 15, 1979, and granted on February 19, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations adopted by the Administrator of the Environmental Protection Agency pursuant to Section 301(b)(1) of the Clean Water Act, 33 U.S.C. 1311(b)(1), to establish effluent limitations on discharges of pollutants, based upon the application of "best practicable control technology currently available," must include a variance provision that requires consideration of the economic ability of an individual discharger of pollutants to afford the costs of such technology.

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311 and 1314, and Title 40 of the Code of Federal Regulations are set forth in Appendix A, *infra*, 1a-6a.

STATEMENT

In *E. I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112, 116-136 (1977), this Court held that Section 301(b) of the Clean Water Act, 33 U.S.C. 1311(b), authorizes the Environmental Protection Agency to promulgate regulations setting effluent limitations on the discharges of pollutants by various categories of dischargers. At issue in these suits is the validity of the regulations promulgated by EPA pursuant to Section 301(b)(1)(A) of the Act, 33 U.S.C. 1311(b)(1)(A), with regard to effluent limitations in the coal, crushed stone, and construction sand and gravel industries. See generally 40 C.F.R. Parts 434 and 436. More particularly, these cases concern whether, in acting on an application by a discharger of pollutants for a variance from the established national effluent standard, the Administrator of the EPA must consider an individual discharger's economic inability to comply with the applicable Section 301(b)(1)(A) effluent limitation.[1] The statutory and procedural background of this controversy is set forth below.

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[1] The terms "effluent limitation," "discharge of a pollutant," "pollutant," and "point source" are defined in Section 502 of the Act, 33 U.S.C. (and Supp. I) 1362. See *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 204 (1976).

1. Concluding that earlier federal water pollution control legislation had been "inadequate in every vital aspect," [2] Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*[3] This statute, now commonly referred to as the Clean Water Act, declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1); see *Costle* v. *Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), slip op. 3. To achieve this goal, Congress has prohibited "the discharge of any pollutant by any person," unless that discharge complies with various provisions of the Act, including the effluent limitations and mandatory permit requirements that constitute the core of this complex statutory scheme. See 33 U.S.C. 1311(a).[4]

[2] S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), reprinted in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Ser. No. 93-1, at 1425 (Comm. Print 1973). See also *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 202-203.

[3] The 1972 Amendments substantially rewrote the Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.* The earlier Act had unsuccessfully relied on ambient water quality standards to control the problems of water pollution. See *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 202-203. The 1972 Amendments, as further amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Act of November 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467, primarily focus on "achieving maximum 'effluent limitations' on [all] 'point sources' * * *." *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 204-205 & n12.

a. As this Court held in *duPont* v. *Train*, *supra*, Congress intended that the Administrator of the EPA, pursuant to Section 301(b) of the Act, 33 U.S.C. (and Supp. I) 1311(b), would set effluent limitations for categories of "point sources." [5] Section 301(b) provides for the implementation of effluent limitations for existing point sources in two stages. First, Section 301(b)(1)(A) directs the Administrator to establish effluent limitations, to be met not later than July 1, 1977, "requir[ing] the application of the best practicable control technology currently available" ("1977 limitations"). Second, Section 301(b)(2), 33 U.S.C. (Supp. I) 1311(b)(2), requires EPA to set more stringent effluent limitations, to be met not later than July 1, 1987, requiring application of either "best available technology economically achievable" or "best conventional pollutant control technology", depending upon the type of pollutant ("1987 limitations").[6]

[4] Section 301(a) of the Act, 33 U.S.C. 1311(a) provides that "[e]xcept as in compliance with this section and sections [302, 306, 307, 318, 402, and 404 of the Act], the discharge of any pollutant by any person shall be unlawful." Section 301(b) ("this section") concerns "effluent limitations" and Section 402 governs the issuance of permits.

[5] A "point source" is a discrete outlet from which pollutants may be discharged. 33 U.S.C. (Supp. I) 1362(14). In *duPont* v. *Train*, the Court determined that EPA could promulgate effluent limitations on an industry-by-industry basis rather than a point source-by-point source basis. See 430 U.S. at 126-136.

[6] When this Court decided *duPont* v. *Train*, *supra*, the Act required the second level of effluent limitations (*i.e.*, "best

The provisions governing both the 1977 limitations and the 1987 limitations further state that the Administrator shall define the respective levels of pollution control technology "pursuant to Section [304(b) of the Act]." 33 U.S.C. 1311(b)(1)(A), (Supp. I) 1311(b)(2)(A) and (E). Section 304(b), in turn, explains the terms "best practicable," "best available," and "best conventional" technology. With regard to the 1977 limitations, Section 304(b)(1)(B) provides that "[f]actors relating to the assessment of best practicable control technology * * * shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved" as well as "the age of equipment and

available technology economically achievable") to be achieved by 1983. The Court thus referred to these more severe standards as the "1983 limitations." As amended in 1977, Section 301(b)(2) has deferred the best available technology deadline. For certain toxic pollutants, the best available technology must now be achieved by July 1, 1984. See 33 U.S.C. (Supp. I) 1311(b)(2)(C) (Section 301(b)(2)(C)). For other pollutants, the deadline is between July 1, 1984, and July 1, 1987, depending upon when EPA establishes the limitation. See 33 U.S.C. (Supp. I) 1311(b)(2)(F) (Section 301(b)(2)(F)). Finally, for so-called "conventional pollutants" (33 U.S.C. (Supp. I) 1314(a)(4)), the Clean Water Act of 1977 requires that "best conventional pollutant control technology" be achieved no later than July 1, 1984. See 33 U.S.C. (Supp. I) 1311(b)(2)(E) (Section 301(b)(2)(E)). For purposes of this case, there is no pertinent distinction between "best available technology economically achievable" and "best conventional pollutant control technology." Because in all events the second tier of effluent limitations must be met no later than 1987, we will refer to the various different standards under Section 301(b)(2) collectively as the "1987 limitations."

facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. 1314(b)(1)(B).

With one exception, Section 304(b)(2)(B), 33 U.S.C. (Supp. I) 1314(b)(2)(B), adopts the same factors in defining best available technology (the 1987 limitations) as those employed in defining the best practicable technology. Whereas Section 304(b)(1)(B) directs the Administrator to weigh the total cost of implementing the proposed 1977 limitations against the pollution reduction benefits of those limitations, Section 304(b)(2)(B) merely provides that the Administrator "take into account * * * the cost of achieving such effluent reduction." See also *American Meat Institute* v. *EPA*, 526 F.2d 442, 445-446 (7th Cir. 1975); 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Ser. No. 93-1, at 169-170 (Comm. Print 1973) (hereinafter "Leg. Hist.") (remarks of Sen. Muskie) ("cost-benefit analysis" inapplicable to 1987 limitations).[7] In addition, Congress made clear that in setting the 1987 limitations, EPA should absolutely prohibit all discharges of pollutants if "such

[7] Senator Muskie, the Act's primary author, further explained that ordinarily the 1977 limitations should represent "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." The 1987 limitations, in contrast, "should, at a minimum, be established with reference to the best performer in any industrial category." 1 Leg. Hist. 169-170.

elimination is technologically and economically achievable for a category or class of point sources * * *." 33 U.S.C. (Supp. I) 1311(b)(2)(A) (Section 301(b)(2)(A)).[8] Because the 1987 limitations were thus intended to be significantly more stringent than the 1977 limitations, Congress further provided that EPA may modify the 1987 limitations as applied to particular point sources if the discharger demonstrates that the modification "(1) will represent the maximum use of technology within [his] economic capability * * * and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. 1311(c) (Section 301(c)). See *American Meat Institute* v. *EPA*, *supra*, 526 F.2d at 449 n.15.

b. To ensure compliance with these effluent limitation standards, Congress, in Section 402 of the Act, established the National Pollutant Discharge Elimination System ("NPDES"). It is unlawful for any person to discharge pollutants into the Nation's waters without an NPDES permit, and such permits incorporate the effluent limitations promulgated by EPA under Section 301(b). See 33 U.S.C. (and Supp. I) 1342(a)(1) and 1311; *Crown Simpson Pulp Co.* v. *Costle*, No. 79-797 (Mar. 17, 1980), slip op. 1; *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 3. Thus, an NPDES permit under Section 402 "serves

[8] In those circumstances in which application of the 1987 limitations does not result in the complete elimination of discharges, Section 301(d) of the Act requires the Administrator to review the 1987 standard periodically. See 33 U.S.C. 1311(d); *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 116 (D.C. Cir. 1976).

to transform generally applicable effluent limitations * * * into the obligations (including a timetable for compliance) of the individual discharger * * *." *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 205 (1976). See also *duPont* v. *Train*, *supra*, 430 U.S. at 119, 126 n.15.

NPDES permits are issued by the EPA or, in those covered jurisdictions in which EPA has authorized a state agency to administer the NPDES program,[9] by a state agency subject to EPA review. See 33 U.S.C. (and Supp. I) 1342(a)-(d); *Crown Simpson Pulp Co.* v. *Costle*, *supra*, slip op. 1-2, 4; *duPont* v. *Train*, *supra*, 430 U.S. at 119-120 & n.7; *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 206-208.[10] At the same time that a discharger applies for a permit, it may also request a variance from the applicable Section 301(b) effluent limitation. See, *e.g.*, 40 C.F.R. 434.22, 436.22. EPA has now established the 1977 limitations for 42 different industrial categories (40 C.F.R. Parts 405-460), and with respect to each category, EPA has promulgated a standard variance clause setting forth the grounds upon which the permit issuing authority may grant

[9] Thirty-two states and covered territories operate their own NPDES program.

[10] The procedures governing issuance of an NPDES permit are more fully discussed in *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 3-5. See also 40 C.F.R. Part 124. Review of an EPA decision refusing to issue a permit or variance (or to approve a state-issued permit or variance) lies in the court of appeals under Section 509(b)(1)(F) of the Act, 33 U.S.C. 1369(b)(1)(F). See *Crown Simpson Pulp Co.* v. *Costle*, *supra*.

an individual discharger a modification of the effluent limitations.[11]

This standard variance clause takes into account only those factors listed in Section 304(b)(1)(B)—that is, the factors that EPA must consider in setting the 1977 limitations. In other words, a discharger may obtain a variance only if it demonstrates that its particular site-specific engineering features or other characteristics enumerated in Section 304(b)(1)(B) are fundamentally different from the comparable characteristics of other, more typical dischargers in the same industry. See, *e.g.*, *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1038-1040 (D.C. Cir. 1978); 44 Fed. Reg. 32893-32894 (1979); 40 C.F.R. 434.22 (App. A, *infra*, 5a-6a). For example, a discharger might be entitled to a variance if it could show that given its unique location and circumstances, adherence to the 1977 limitations would be substantially more expensive or would consume significantly more energy or would produce substantially more air pollution than compliance by other members of the same industry. See 44 Fed. Reg. 32894 (1979). The variance clause does not, however, allow the permit issuing agency to consider (or to grant) a variance based upon a claim that the discharger-applicant cannot afford best practicable technology (*i.e.*, the 1977 limitations). As EPA recently explained (43 Fed. Reg. 50042 (1978) (emphasis in original)):

> While EPA allows compliance costs to be considered under the [1977 limitations] variance clause, it should be noted that EPA continues to believe that § 301(c) of the Clean Water Act (allowing waivers based upon plant-specific, economic *capability* or "affordability") applies only to best available technology [1987] limitations.
>
> Thus a plant may be able to secure a [1977 limitations] variance by showing that the plant's own compliance costs with the national guideline limitation would be *x* times greater than the compliance costs of the plants EPA considered in setting the [1977 limitations]. A plant may not, however, secure a [1977 limitations] variance by alleging that the plant's own financial status is such that it cannot afford to comply with the [1977 limitations].

See also 43 Fed. Reg. 44847-44848 (1978); *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841 (1977) (decision of the Administrator).

2. In April 1977, EPA promulgated the 1977 limitations for certain subcategories of the coal mining industry, including coal preparation plants, acid mine drainage and alkaline mine drainage (42 Fed. Reg.

[11] The variance clause is reprinted in full in Appendix A, *infra*, 5a-6a. In pertinent part, the standard clause states that "[a]n individual discharger or other interested person may submit evidence to [the licensing authority] that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. * * * If such fundamentally different factors are found to exist, [the licensing authority] shall establish for the discharger effluent limitations * * * either more or less stringent than the [1977 limitations] to the extent dictated by such fundamentally different factors."

21380 *et seq.*, adopting 40 C.F.R. Part 434). In July 1977, EPA promulgated the 1977 limitations for the crushed stone and construction sand and gravel subcategories of the mineral mining and processing category (42 Fed. Reg. 35843 *et seq.*, adopting 40 C.F.R. Part 436). Both regulations included EPA's standard variance provision for each subcategory.[12]

Petitions to review both sets of regulations were filed in various courts of appeals under Section 509(b)(1)(E), 33 U.S.C. 1369(b)(1)(E), and all petitions were ultimately transferred to the Fourth Circuit.[13] The petitions challenged the regulations on various grounds, including the adequacy of the variance clauses. Relying on the Fourth Circuit's prior decision in *Appalachian Power Co.* v. *Train*, 545 F.2d 1351 (1976), respondents claimed that the variance clauses were invalid because EPA refused to consider an individual discharger's economic ability to afford best practicable technology. According to respondents, Section 301(c) requires EPA to take "affordability"

[12] 40 C.F.R. 434.22 (coal preparation plants); 40 C.F.R. 434.32 (acid mine drainage); 40 C.F.R. 434.42 (alkaline mine drainage); 40 C.F.R. 436.22 (crushed stone) and 40 C.F.R. 436.32 (construction sand and gravel).

[13] Because the variance clause regulation was an integral part of the 1977 effluent limitations promulgated by EPA, the court of appeals had jurisdiction to review the variance clause as "the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 1311 * * * of this title [section 301 of the Act]." 33 U.S.C. 1369(b)(1)(E). See *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1033 n.29 (D.C. Cir. 1978); cf. *Crown Simpson Pulp Co.* v. *Costle, supra.*

into account when it reviews a request for a variance from the 1977 limitations.

In *National Crushed Stone Association* v. *EPA*, the court of appeals upheld (Pet. App. 29a-35a) respondents' challenge to the variance clauses promulgated in connection with the mineral mining regulations. See 40 C.F.R. 434.22, 434.32, and 434.42.[14] Following its earlier decision in *Appalachian Power Co.* v. *Train, supra*,[15] the court concluded that variance clauses pertaining to the 1977 limitations must per-

[14] The court also vacated and remanded the substantive mineral mining regulations on various grounds (Pet. App. 14a-29a). Those issues are not before the Court.

[15] In *Appalachian Power Co.* v. *Train, supra*, the court of appeals had remanded a similar variance clause pertaining to the steam electric power industry (see 39 Fed. Reg. 36186 *et seq.* (1974)), on the ground that "EPA should come forward with a meaningful variance clause applicable to existing as well as new sources, taking into consideration at least [the] statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B)." 545 F.2d at 1359-1360 (footnote omitted). The court there concluded (545 F.2d at 1359):

> Clearly, the Act, in its regulatory plan, contemplates increasingly stringent control measures for existing and new sources culminating in the elimination of the discharge of all pollutants into navigable waters by 1985. We are of opinion that the initial phase of these regulations, the 1977 standards and the subsequent new source limitations, were not intended to be applied any less flexibly than the final Phase II-1983 [now 1987] requirements. Thus, if such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted; they should be equally relevant when applied to the less stringent 1977 standards as well as the new source requirements.

mit consideration of the same factors that Section 301(c) of the Act requires the agency to weigh in acting on variance applications from the 1987 limitations—specifically, the economic capability of the individual discharger. In the court of appeals' view, a contrary decision "could easily close a plant in 1979 which would be allowed to operate under a variance in 1983" (Pet. App. 34a).

In *Consolidation Coal Company* v. *Costle*, the court of appeals generally affirmed EPA's regulations governing the coal mining industry (Pet. App. 40a-78a). As in *National Crushed Stone Association*, however, it concluded that the variance clauses adopted by EPA with regard to the 1977 limitations were unduly restrictive (Pet. App. 50a-52a). Accordingly, it remanded the variance clauses to EPA "for revision to conform with *National Crushed Stone*" (*id.* at 52a). See also *Appalachian Power Co.* v. *Train*, Nos. 74-2096 etc. (4th Cir. Apr. 28, 1980), slip op. 17.

SUMMARY OF ARGUMENT

This case poses the question whether the Clean Water Act, 33 U.S.C. 1251 *et seq.*, requires EPA to grant a variance from the 1977 effluent limitations to an individual discharger that cannot afford to meet those standards. Relying exclusively on its prior decision in *Appalachian Power Co.* v. *Train*, 545 F.2d 1351 (4th Cir. 1976), the court of appeals summarily concluded that EPA must take into account the economic circumstances of the individual discharger. That conclusion is not supported by the

language and structure of the statute. Section 301(b)(1)(A) of the Act states that the 1977 limitations "shall require the application of the best practicable control technology currently available," as that term is defined in Section 304(b)(1)(B) of the Act. Although Section 304(b)(1)(B) directs the Administrator to weigh the "total cost" to industry against "the effluent reduction benefits to be achieved" in establishing the 1977 limitations, no provision of the Act suggests that EPA must, or even may, consider the individual discharger's ability to afford "best practicable control technology."

In contrast, Congress expressly provided that EPA could grant a variance from the more stringent 1987 limitations ("best available technology *economically achievable*") to an individual discharger that could not afford to comply with those effluent limitations. Section 301(c) specifies that such a modification is permissible solely with regard to the 1987 limitations and only if the individual discharger demonstrates that the variance "will represent the maximum use of technology within [its] economic capability" and "will result in reasonable *further* progress toward the elimination of the discharge of pollutants." 33 U.S.C. 1311(c) (emphasis supplied). In light of the requirement that a Section 301(c) variance from the 1987 limitations make further progress in pollution control beyond the level already established by the 1977 limitations, it is clear that Congress purposefully excluded the 1977 limitations from the purview of Section 301(c). Accordingly, the court of

appeals' application of Section 301(c) to the 1977 limitations is wholly unwarranted.

The legislative history of the Act confirms that Congress deliberately adopted "best practicable control technology" (the 1977 limitations) as a *minimal* level of effluent control that *all* dischargers within a category or class had to meet, even if the cost of compliance could force certain point sources to cease operations. See, *e.g.*, S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 121 (1972) (reprinted at 1 Leg. Hist. 304); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 100-101, 107 (1972) (reprinted at 1 Leg. Hist. 787-788, 794); 1 Leg. Hist. 169-170 (remarks of Sen. Muskie, primary author of the Act); *id* at 156, 217-218, 523. As Representative Jones of Alabama, Chairman of the House Conferees on the Act, explained (1 Leg. Hist. 231-232; emphasis supplied):

> If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge [permit] issued in the interim would reflect the fact that *all discharges not in compliance with such "best practicable control technology currently available" would cease by June 30, 1977.*
>
> * * * * *
>
> * * * [S]ection 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983, requirement proposed by the owner or operator.
>
> * * * * *

> *This provision is not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of "best practicable control technology."*

In short, Congress deliberately and emphatically concluded that "a plant-by-plant determination of the economic impact of [a 1977] effluent limitation is neither expected, nor desired, and, in fact, it should be avoided" (1 Leg. Hist. 255) (remarks of Rep. Dingell).

In our submission, the language and legislative history of the Act described above leave no room for doubting that EPA's construction of the Act is "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency." *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975). Indeed, this Court has repeatedly stressed that EPA's interpretation of the environmental laws is entitled to particular deference because of the complex and scientific nature of the statutes that must be administered by EPA. See, *e.g.*, *E. I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112, 134-135 (1977); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976); *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 226-227 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, *supra*. Here, the court of appeals' failure to defer to EPA's consistent administrative construction is particularly objectionable, because the legislative debates and hearings accompanying the 1977 amendments to the Act strongly evidence Congress' acquiescence in EPA's implementation of the 1977 limitations.

ARGUMENT

THE CLEAN WATER ACT DOES NOT REQUIRE EPA TO GRANT A VARIANCE FROM THE 1977 EFFLUENT LIMITATIONS TO AN INDIVIDUAL DISCHARGER BASED ON ITS INABILITY TO AFFORD "BEST PRACTICABLE TECHNOLOGY"

A. Introduction

The statutory scheme underlying this controversy has been canvassed in detail elsewhere. See, *e.g.*, *E. I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112, 116-121 (1977); pages 4-11, *supra*. In sum, Section 301(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311(b), directs EPA to establish two levels of progressively more stringent effluent limitations. *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1019 (D.C. Cir. 1978). Section 304(b), in turn, enumerates the various factors that EPA must consider in setting the 1977 and 1987 limitations. See 33 U.S.C. (and Supp. I) 1314(b). EPA has always interpreted the less than pellucid language of the Act as permitting the Administrator to determine the effluent limitations on an industry-wide rather than plant-by-plant basis. At the same time, because EPA cannot analyze the relevant characteristics of every discharger in a particular industry before setting the 1977 limitations,[16] EPA's regulations have consistently allowed for variances from the 1977 limitations in circumscribed cases. See pages 9-11, *supra*; *duPont* v. *Train*, *supra*, 430 U.S. at 128.

[16] The Act places severe time limits on EPA. See *duPont*, *supra*, 430 U.S. at 122-124 & n.13, 131-132. It is therefore impossible for EPA to make a thorough survey of each discharger in every industry. For example, there are more than 4,800 crushed stone facilities (C.A. App. 275).

In *duPont* v. *Train*, *supra*, this Court upheld EPA's overall construction of the Act. Although recognizing that the Act did not expressly mandate the agency's approach to the question of effluent limitations, the Court concluded that Section 301(b) of the Act "authorizes the 1977 limitations * * * to be set by [industry-wide] regulation, so long as some allowance is made for variations in individual plants." 430 U.S. at 128. The court did not, however, pass upon the actual variance clause then in existence. *Id.* at 128 n.19.

At issue in these cases is the scope of EPA's standard variance clause promulgated with respect to the 1977 limitations. Though EPA has changed its variance clause from time to time since the *duPont* decision, it has always ruled that an individual discharger may not obtain a variance merely because it cannot afford to comply with the 1977 limitations. Instead, under the current regulations, EPA may grant a variance to an individual discharger based on the agency's reconsideration of the factors enumerated in Section 304(b)(1)(B)—that is, the same factors that EPA must evaluate in setting the 1977 limitation in the first instance. In other words, an individual point source may be permitted to operate under modified effluent limitations, if it can demonstrate that it is fundamentally different from other

more typical members of the same industry with respect to one or more of the factors listed in Section 304(b)(1)(B). See, *e.g.*, 40 C.F.R. 434.22; *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841 (1977) (decision of the Administrator).

Without discussing either the language or legislative history of the Act, the court of appeals in these cases held that EPA's standard variance clause was unduly restrictive. It apparently concluded that Section 301(c) of the Act, 33 U.S.C. 1311(c), requires EPA to take into account the economic difficulties of the individual discharger when evaluating a request for a variance from the 1977 limitations. We submit that the language and legislative history of the Act squarely refute this conclusion and that the court below should have deferred to the consistent and reasonable administrative construction of the Clean Water Act at issue here.[17]

[17] In our petition for a writ of certiorari, we noted (Pet. 20-22) that these cases present a substantial ripeness question. We therefore suggested (Pet. 22) that if the Court agreed that respondents' challenge to the variance provision promulgated by EPA with regard to the 1977 limitations was premature that it vacate the decisions below on that ground. If the Court disagreed with our submission regarding ripeness, however, we suggested that the Court grant plenary review to consider the merits of the variance clause controversy. The Court granted the petition for a writ of certiorari, and we now believe that it would be appropriate for the Court to resolve the statutory question at this time.

Although we are informed that none of the respondents in this case have ever filed a request for a variance based upon economic circumstances, such an application would have been a futile gesture given the "definitive" and longstanding nature of EPA's administrative construction of the Clean Water Act. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 151 (1967).

B. The Language And The Structure Of The Act Establish That "Affordability" Is Not A Basis For A Variance From The 1977 Limitations

1. Section 301(b)(1)(A) provides that the 1977 effluent limitations "shall require the application of the best practicable control technology currently available as defined * * * pursuant to section [304 (b) of the Act]." Section 304(b)(1)(B), in turn, carefully specifies the considerations that EPA must take into account in setting the 1977 limitations:

> Factors relating to the assessment of best practicable control technology currently available to

Moreover, here, as in *Abbott Laboratories*, "the issue tendered is a purely legal one." *Id.* at 149. Finally, withholding judicial consideration of the variance issue until a particular discharger files and is denied a request for a variance might present hardships for both parties. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 152-154. Under the 90-day preclusion rule set forth in Section 509(b) of the Act, 33 U.S.C. 1369(b), respondents may well have been forever barred from challenging the variance regulation if they did not seek review in the court of appeals within 90 days of its promulgation. See *Union Electric Co.* v. *EPA*, 427 U.S. 246, 255-256 (1976). Cf. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978). See also note 13, *supra*. At the same time, we are informed by EPA that a present ruling by this Court would advance rather than impede the administrative enforcement of the Act. See *Andrus* v. *Idaho*, No. 79-260 (Apr. 16, 1980), slip op. 6-9; compare *Abbott Laboratories*, *supra*, 387 U.S. at 154-155. In light of all these circumstances, we urge the Court to exercise its discretion to determine the statutory question posed by the parties at this time. See, *e.g.*, *Andrus* v. *Idaho*, *supra*; *Abbott Laboratories* v. *Gardner*, *supra*; *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1032-1033 (D.C. Cir. 1978) (concluding that variance clause presents ripe issue).

> comply with subsection (b)(1) of section [301] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Thus, in determining the 1977 limitations, EPA must weigh the "total cost" to industry against the potential "effluent reduction benefits" and must also consider various technical aspects of the particular industry in question.

But neither Section 304(b)(1)(B) nor any other provision of the Act suggests that the 1977 limitations must be tailored to remedy the financial difficulties of a particular discharger. See *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1033-1038 (D.C. Cir. 1978). See also *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976).[18] The cost-benefit assessment required by Section 304(b)(1)(B) is satisfied where EPA considers whether the total economic cost to the

[18] In *Union Electric Co.*, the Court unanimously concluded that the Clean Air Act's directive to implement air quality plans in a "practicable" and "reasonable" fashion did not require EPA to consider the economic or technological feasibility of a state plan despite its hardships on particular dischargers.

industry of requiring one level of technology rather than another appears to be proportional to the incremental effluent reduction benefits to be derived from the application of the more expensive technology. Section 304(b)(1)(B) does not, in addition, require the agency to make a case-by-case determination whether a certain cost-effective level of technology will force a particular discharger to cut back or even cease its operations because of its financial condition. To the contrary, "the statute clearly contemplates the closing of marginal plants which cannot function economically with the costs added by [the 1977] water pollution controls." *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 113 (D.C. Cir. 1976).

In striking contrast, Congress expressly authorized EPA to grant variances from the 1987 limitations based on a discharger's inability to afford compliance with this more stringent set of effluent controls. Section 301(b)(2)(A) states that the 1987 limitations "shall require application of the best available technology *economically achievable*." 33 U.S.C. (Supp. I) 1311(b)(2)(A) (emphasis supplied). And Section 301(c) permits EPA to "modify the requirements of subsection (b)(2)(A) of this section [the 1987 limitations]" as applied to a particular point source, provided "that such modified requirements (1) *will represent the maximum use of technology within the economic capability of the* [*discharger*]; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. 1311(c) (emphasis supplied). See

also 33 U.S.C. 1312(b)(2) (variance from Section 302 effluent limitations based on excessive "economic and social costs").

It is thus apparent that Congress did not intend that the agency would consider "the economic capability of the [individual discharger]" in applying the 1977 limitations to a particular point source. Although the 1987 limitations are unquestionably designed to be more stringent than the 1977 limitations,[19] the Administrator must consider nearly identical factors in setting both. Compare 33 U.S.C. 1314(b)(1)(B) with 33 U.S.C. (Supp. I) 1314(b)(2)(B).[20] Nonetheless, Section 301(c) directs EPA to consider the individual discharger's financial difficulties solely with regard to the 1987 limitations ("subsection (b)(2)(A) of this section"), and then only if the modified requirements will "result in reasonable further progress toward the elimination of

[19] See, *e.g.*, *duPont* v. *Train*, *supra*, 430 U.S. at 121; *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1019; *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1359 (4th Cir. 1976); 1 Leg. Hist. 149, 163, 169-170 (remarks of Sen. Muskie and EPA Admin. Ruckelshaus). In fact, Section 301(b)(2)(A) makes clear that the 1987 limitations are to eliminate all discharges if "such elimination is technologically and economically achievable." 33 U.S.C. (Supp. I) 1311(b)(2)(A).

[20] The only difference between Section 304(b)(1)(B) and Section 304(b)(2)(B) is that the Administrator must balance "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application" in establishing the 1977 limitations, whereas the Administrator must merely consider "the cost of achieving such effluent reduction" with respect to the 1987 limitations.

the discharge of pollutants" beyond that already achieved by the 1977 limitations. See *duPont* v. *Train*, *supra*, 430 U.S. at 121; *American Meat Institute* v. *EPA*, 526 F.2d 442, 449 n.15 (7th Cir. 1975); *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027, 1037 (3d Cir. 1975). In short, the court of appeals' conclusion (Pet. App. 32a; *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1359-1360 (4th Cir. 1976)) that EPA must review a variance application from the 1977 limitations in accordance with Section 301(c) is wholly unjustified as a matter of statutory language. Accord, *Weyerhaeuser Co.* v. *Costle*, *supra*.

Indeed, in light of Section 301(c) and the other specific variance provisions carefully established by Congress throughout the Act,[21] there is a substantial question whether EPA need grant any variances from the 1977 limitations at all. See *duPont* v. *Train*, *supra*, 430 U.S. at 137-138; *American Petroleum Institute* v. *EPA*, 540 F.2d 1023, 1033 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977); Kalur, *Will Judicial Error Allow Industrial Point Sources*

[21] See, e.g., 33 U.S.C. 1312(b)(2) (variance from Section 302 effluent limitations); 33 U.S.C. 1326(a) (variance for thermal discharge effluent limitations); 33 U.S.C. (Supp. I) 1342(d)(3) and (e) (waiver provisions regarding permit review); 33 U.S.C. (Supp. I) 1317(a) (variance from 1987 limitations regarding certain nontoxic pollutants); 33 U.S.C. (Supp. I) 1311(h) (variance from 1977 limitations for publicly owned treatment works); 33 U.S.C. (Supp. I) 1311(i) (compliance deadline extensions for publicly owned treatment works); 33 U.S.C. (Supp. I) 1319(a)(5)(B) (extensions for 1977 limitations).

to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Consequence, 7 Ecol. L.Q. 955 (1979). Cf. *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 5; *Huddleston* v. *United States*, 415 U.S. 814, 822 (1974); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). Of course, EPA has always permitted such variances on a limited basis, and in *duPont* v. *Train*, this Court upheld that practice. 430 U.S. at 128. But, the fact that the agency will issue a variance based on its reconsideration of the factors listed in Section 304 (b)(1)(B) does not mean that it must also grant variances based on the "affordability" factor covered by Section 301(c).

2. Since Section 301(c) by its plain terms does not apply to the 1977 limitations, it is not surprising that the court of appeals did not hold that variances from the 1977 limitations are governed by Section 301(c) *ex proprio vigore*. Rather, the court suggested that in its view the 1977 standards should not be applied any less flexibly than the 1987 standards, because otherwise EPA "could easily close a plant in 1979 which would be allowed to operate under a variance in 198[7]" (Pet. App. 34a; see also *Appalachian Power Co.* v. *Train*, *supra*, 545 F.2d at 1359). However, as this Court explained in *duPont* with regard to a variance question similar to that at issue here, "[t]he question * * * is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations." 430 U.S. at 138 (emphasis in original).

More important, the court of appeals' repeated rejection of the standard variance clause appears to be premised on a misreading of the Act. The 1977 limitations are a minimal level of effluent control to be complied with by all dischargers now and in the future. Any "affordability" variance under Section 301(c) must still "result in reasonable further progress toward the elimination of the discharge of pollutants" beyond that already required by the 1977 regulations. 33 U.S.C. 1311(c). Accordingly, every discharger operating with a Section 301(c) variance is required, at a minimum, to adhere to the 1977 limitations. Thus, Section 301(c) would not allow a plant that cannot afford to comply with the 1977 limitations to reopen in 1987.

3. EPA's construction of the Act obviously creates the possibility that marginal businesses either will restrict their operations or close their doors altogether. That Congress both recognized and intended that result is evident from the face of the statute, however. Thus, Section 507(e) of the Act, 33 U.S.C. 1367, directs the Administrator to investigate "potential loss or shifts of employment which may result from the issuance of any effluent limitation * * * including * * * threatened plant closures or reductions in employment allegedly resulting from such limitation * * *." Congress thereby sought to preclude employers from using the Clean Water Act as a scapegoat for solving labor or other problems. See 1 Leg. Hist. 217-218 (remarks of Sen. Bayh). At the same time, Section 507(e) stresses that "[n]othing in this subsection shall be construed

to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter." See also H.R. 6867, 96th Cong., 2d Sess. (1980) (proposed bill to amend Section 507(e) to require Administrator to modify effluent limitations "[i]n the case of any finding of adverse effect on employment").

Furthermore, Section 8 of the Act, 86 Stat. 898-899 (amending 15 U.S.C. 636), establishes an $800 million fund to ameliorate the economic impact of the strict effluent limitations required by the Act. Recognizing that the cost of pollution control poses the greatest problem for smaller companies (2 Leg. Hist. 1355), Congress directed the Small Business Administration to use this fund to make loans to small business concerns "likely to suffer substantial economic injury without assistance under this subsection." 15 U.S.C. 636(g)(1). If Congress had intended that the 1977 limitations be modified on behalf of financially troubled companies, such assistance would, of course, be unnecessary.

C. The Decisions Of The Court Of Appeals Are Squarely Inconsistent With The Legislative History Of The Act

In view of the explicit limiting language of Section 301(c), the court of appeals should not have extended the scope of that provision to encompass the 1977 limitations unless the legislative history of the Act unequivocally demonstrates that Congress intended that result. However, no citation to the legislative history concerning the 1977 limitations and Section 301(c) appears in any of the court's three

decisions striking down EPA's variance clause. See Pet. App. 29a-35a, 50a-52a; *Appalachian Power Co.* v. *Train, supra,* 545 F.2d at 1358-1360.[22] More important, the pertinent congressional reports and debates, which are discussed in detail below, convincingly demonstrate that the economic hardships of individual operators are not proper grounds for excusing their compliance with the 1977 limitations. As the District of Columbia Circuit concluded in *Weyerhaeuser Co.* v. *Costle, supra,* 590 F.2d at 1037, the extensive legislative deliberations regarding the Clean Water Act show that Congress "self-consciously made the legislative determination that the health and safety gains that achievement of the

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[22] Compare *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976) ("To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA [Clean Water Act] in discerning its meaning, the court was in error"). The District of Columbia Circuit, in contrast, after thoroughly reviewing the language and legislative history of the Act, upheld the variance regulation at issue here (*Weyerhaeuser Co.* v. *Costle, supra,* 590 F.2d at 1036 (emphasis in original; footnote omitted)):

> We have explored this issue carefully, and we express our conclusion emphatically: Although the *"total cost"* of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); *so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.*
>
> We reach this conclusion under the statute only after satisfying ourselves that the legislative intent is as clear as the result is harsh.

Act's aspirations would bring to future generations will in some cases outweigh the economic dislocation it causes to the present generation."

1. The legislative history unequivocally shows that Congress intended EPA to set the 1977 limitations on an industry-wide basis and that neither Section 304(b)(1)(B) nor Section 301(c) requires EPA to grant variances from the 1977 limitations to individual point sources in financial difficulty. For example, the Conference Report points out (1 Leg. Hist. 302-304; see *duPont* v. *Train*, *supra*, 430 U.S. at 129), that by July 1, 1977 "all point sources of pollution * * * must have in use the best practicable treatment technology [the 1977 limitations]" and that, in contrast, the second level of effluent limitations are subject to modification in accordance with Section 301(c).[28] The Report further states (1 Leg. Hist. 304, 309):

> The conferees intend that the Administrator * * * will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable [the 1987 limitations]. The burden will be on him to show that modified requirements will represent the maximum use of technology within his economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants. * * *
>
> * * * * *
>
> Except as provided in Section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

Representative Jones of Alabama, chairman of the House Conferees, in presenting the conference bill to the members of the House, likewise confirmed that only the 1987 limitations were subject to "affordability" variances under Section 301(c) and that the 1977 limitations were intended to apply to all point sources regardless of their economic circumstances (1 Leg. Hist. 231-232; emphasis supplied):

> It is the intention of the managers that the July 1, 1977, requirements be met by phased compliance and that *all* point sources will be in full compliance no later than July 1, 1977. * * *
>
> If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge is-

[28] The 1972 legislative history refers, of course, to the "best available technology economically achievable" (33 U.S.C. (Supp. I) 1311(b)(2)(A)) as the 1983 limitations rather than the 1987 limitations. See note 6, *supra*.

sued in the interim would reflect the fact that *all discharges not in compliance with such "best practicable control technology currently available" would cease by June 30, 1977.* * * *

By the term "best practicable" the managers mean that all factors set forth in Section 304 (b)(1)(B) are to be taken into consideration. * * * The managers expect that the total cost of application of technology in relation to the effluent limitation benefits to be achieved will always be a factor used by the Administrator in his determination of "best practicable control technology currently available" *for a given category or class of point source.*

* * * * *

The Administrator may modify the [1987] requirements * * * section 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983 [now 1987] requirement * * *.

* * * * *

This provision is not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of "best practicable control technology." [24]

See also 1 Leg. Hist. 162-163, 169-170, 171-172; 2 Leg. Hist. 1259 (statements of Sen. Muskie); 1 Leg. Hist. 524 (remarks of Rep. Harsha); 2 Leg. Hist. 1232 (remarks of Rep. Terry) (Act "would require the best practicable technology as a floor in all

[24] Representative Jones' explication of the Clean Water Act also makes clear that a discharger that cannot afford to comply with the 1977 limitations will not be able to reopen under a Section 301(c) variance in 1987. See pages 26-27, *supra*. See also 1 Leg. Hist. 255 (remarks of Rep. Dingell).

cases"); *id.* at 1281 (remarks of Sen. Bentsen); *id.* at 1461-1462 (S. Rep. No. 92-414, 92d Cong., 1st Sess. 43-44 (1971)).[25]

In addition, the managers of the Act in both Houses of Congress carefully explained that the cost-benefit analysis required by Section 304(b)(1)(B) with respect to the 1977 limitations was not intended to permit financially troubled operators to avoid compliance. Thus, Representative Dingell, a sponsor of the bill, emphasized that "a plant-by-plant determination of the economic impact of [the 1977] effluent limitation[s] is neither expected, nor desired, and, in fact, it should be avoided" (1 Leg. Hist. 255). Similarly, after noting that the 1977 limitations applied to all industrial point sources, Senator Muskie clarified what Congress meant by the term "practicable" in Section 304(b)(1)(B) (1 Leg. Hist. 170; emphasis supplied):

> The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such

[25] Section 301(b)(3) of the House version of the Act (H.R. 11896, 92d Cong., 2d Sess. (1971)) would have permitted EPA in appropriate circumstances to extend the deadline for compliance with the 1977 limitations for up to two years. See 1 Leg. Hist. 881, 964-965; 2 Leg. Hist. 1114-1115, 1197. The conference bill that was subsequently enacted into law does not allow for even this limited kind of variance. Kalur, *supra*, 7 Ecol. L.Q. at 962-965. In 1977, the Act was amended to permit limited delays in a few situations. See 33 U.S.C. (Supp. I) 1319(a)(5)(B).

marginal level of reduction *for any class or category of sources.*

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and *to avoid imposing on the Administrator any requirement * * * to determine the economic impact of controls on any individual plant in a single community.*

It is assumed, in any event, that "best practicable technology" will be the minimal level of control imposed on all sources within a category or class * * *.[26]

See also *id.* at 231, 237-238 (statements of Rep. Jones; emphasis supplied) ("In enforcing the 1977 'best practicable technology' regulation, the Environmental Protection Agency (EPA) would take into account the *total* impact of the action on plants within a given category (*e.g.*, steel, chemical, paper) considering *overall* financial ability to comply, and the *national impact* of compliance on communities and workers"); 2 Leg. Hist. 1186, 1188 ("social and economic costs * * * [should not be] addressed on an *ad hoc*, case-by-case approach").

2. The legislative history also evidences Congress' understanding that implementation of strict pollution control might well force marginal enterprises in various industries to cease operations. See, *e.g.*, 1 Leg. Hist. 123, 142, 156, 188, 217-218, 231, 352-353, 375, 413, 457-458, 513-514, 517, 523, 561, 601, 654-659, 710-711, 717-723, 731-733, 740, 741-745; 2 Leg. Hist. 1164, 1353-1361. *Water Pollution Control Legislation—1971: Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 857, 1165-1166 (1971); *Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess., Part 2, 622, 660-663; Part 4, 1908 (1971). For example, Senator Bentsen observed that "[t]here is no doubt that we will suffer some disruptions in our economy because of our efforts; many marginal plants may be forced to close." 2 Leg. Hist. 1282. Similarly, EPA studies submitted to, and considered by, Congress estimated that the 1977 limitations would cause the closure of perhaps 300 plants affecting between 50,000 and 125,000 workers. 1 Leg. Hist. 156, 523; CEQ-Commerce-EPA, *The Economic Impact of Pollution Control* 7, 10-11 (1972). And Representative Crane, in opposing the bill, warned that the Act "may throw literally millions of Americans out of work * * *." 1 Leg. Hist. 738. See *id.* at 740 (Rep. Sikes) (4 to 5% of industry subject to closing). See also *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1025, 1036-1037; *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027, 1052 (3d Cir. 1975); 42 Fed. Reg. 21388 (1977) (affect of 1977 limitations on marginal coal companies); 42 Fed. Reg. 35847 (1977) (as many as 35 crushed stone facilities and 26 sand

[26] As this Court recognized in *duPont* v. *Train*, *supra*, 430 U.S. at 129, Senator Muskie was "perhaps the Act's primary author." His comments, as well as the statements of the other floor managers and bill sponsors, are thus entitled to particular weight. See *Simpson* v. *United States*, 435 U.S. 6, 13 (1978).

and gravel plants might close as the result of the 1977 limitations).

Although Congress thus recognized the Act's potential for economic dislocation, it also perceived that continued polluting of this Nation's waters posed a substantially more serious "threat to life" and "the survival of our society." 1 Leg. Hist. 122, 618 (remarks of Sen. Muskie and Rep. Roe). See generally *id.* at 95-136 (debate on overriding presidential veto); *id.* at 741 (remarks of Rep. Drinan regarding "national emergency"); *id.* at 753, 862-863 (H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 66, 393-394 (1972); 2 Leg. Hist. 1253, 1263-1264, 1286 (remarks of Sens. Muskie and Bentsen). Accordingly, Congress deliberately chose not to permit variances from the 1977 limitations on the ground of financial hardship. As Senator Nelson explained (2 Leg. Hist. 1355):

> [T]he approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rule, meaning further tragic delay in stopping the destruction of our environment.

See also *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1036-1037; LaPierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 Iowa L. Rev. 771, 819-820 (1977); Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 Ecol. L. Q. 1, 55 (1976).

In fact, the relevant congressional debates show that Congress specifically created the $800 million revolving loan fund discussed above (page 28, *supra*) as an "alternative to * * * waiving strict environmental standards where economic hardship could be shown." 2 Leg. Hist. 1355 (remarks of Sen. Nelson). See generally *id.* at 1353-1361. Senator Nelson, the author of Section 8 financing, proposed such funding to extend

> Federal aid to those small businesses who would be crushed economically in meeting pollution control requirements but who could make it otherwise. An important benefit of the proposal should be aiding in reconciling any potential point of conflict that might occur between the goal of a decent environment and the goal of a diversity in American life based on the opportunity for small businesses * * *.

1 Leg. Hist. 1356.[27] Congress thereafter overwhelmingly adopted this proposal on the specific understanding that such loans would be available only to

[27] Senator Nelson offered his amendment in the hope "that while many otherwise viable small businesses may not be able to afford the immediate cost of the capital investment necessary to meet the water pollution control requirements, they could in fact manage these costs if given the benefit of low-cost, long-term loans." The loans were designed to carry four percent interest payable over as long a period as 30 years. 2 Leg. Hist. 1353, 1357.

the facilities that EPA certified as meeting effluent limitation standards. *Id.* at 1360. See 2 Leg. Hist. 1218, 1353-1362; 1 Leg. Hist. 148, 152, 214, 336-337, 358, 369, 404, 449-450, 467, 509, 566, 664, 717, 742, 762, 829-830, 858.[28]

D. The Agency's Consistent And Reasonable Construction Of The Act Is Entitled To Great Deference

It is well settled that "'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.'" *E. I. duPont deNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And where, as here, an agency is charged by Congress with issuing substantive regulations and standards regarding a complex, scientific statute, its interpretations and rulings are entitled to particular deference unless plainly "irrational." *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 12. See, *e.g.*, *duPont* v. *Train*, *supra*, 430 U.S. at 134-135 & n.25; *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 256; *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 226-227 (1976);

[28] Congress has also provided for the rapid depreciation of all pollution control facilities. 26 U.S.C. 169 (60 months' depreciation period); see 2 Leg. Hist. 1175. See also pages 27-28, *supra*, and 1 Leg. Hist. 217-218, 654-659, 712-723, 732-733 (discussing limited protection provided by Section 507(e) for workers unemployed as a result of effluent limitations).

Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75, 87 (1975).[29]

The court of appeals thus erroneously set aside the variance provisions at issue in these cases. Although EPA has modified its (1977 limitations) variance clause from time to time in respects not relevant here, it has never waivered from its position that inability to comply with the 1977 limitations is not a ground for a variance. See, *e.g.*, 39 Fed. Reg. 30073 (1974); 40 C.F.R. 434.22 (1976); *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841, 1850-1853 & nn.27 & 30 (1977) (decision of Administrator); 43 Fed. Reg. 50042 (1978); 44 Fed. Reg. 32893-32894 (1979); 40 C.F.R. 434.22. Moreover, it seems beyond dispute that the agency's well-articulated construction cannot fairly be characterized as "irrational," given the language and legislative history limned above. In short, EPA's variance regulations are "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency." *Train* v. *Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 87. Accord, *Weyerhaeuser* v. *Costle*, *supra*; *American Petroleum Institute* v. *EPA*, 540 F.2d 1023, 1033 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977).

Furthermore, EPA's regulations are entitled to particular weight because Congress has "acquiesced in [EPA's] interpretation of the statute." *Board of*

[29] Various provisions of the Act, including Sections 301 and 304 require the Administrator to issue regulations. See also 33 U.S.C. 1251, 1312, 1313, 1316(b), 1342(a)(2), 1361(a); 33 U.S.C. (and Supp. I) 1314, 1317, 1321(b), 1322(b); *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1025.

Education v. *Harris*, No. 78-873 (Nov. 28, 1979), slip op. 18. See, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980), slip op. 23-24; *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In 1977, in the course of extensively amending the Act, Congress thoroughly reviewed "the 1977 requirements for best practicable technology * * * and the manner in which [they have] been administered." 3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, Ser. No. 95-14, at 369 (Comm. Print 1978) (remarks of Rep. Clausen) (hereinafter "Cont. Leg. Hist."). See, *e.g.*, H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 76-78, 85 (1977) (reprinted at 3 Cont. Leg. Hist. 260-262, 269); S. Rep. No. 95-370, 95th Cong., 1st Sess. 1-2, 7-8 (1977); 3 Cont. Leg. Hist. 305, 323-324, 354-355, 368-382, 390, 396-398, 402-404, 410-414, 458-465, 496, 532-533; 4 Cont. Leg. Hist. 859-862, 1094, 1100-1101, 1117-1118, 1123, 1133-1139, 1312-1315, 1318, 1414-1415, 1430-1432, 1462-1464. See generally *Federal Water Pollution Control Act Amendments of 1977: Hearing Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess., Parts 1-10 (1977); *To Amend and Extend Authorizations for the Federal Water Pollution Control Act: Hearings on H.R. 3199 Before the Subcomm. on Water Resources of the House Comm.*

on Public Works and Transportation, 95th Cong., 1st Sess. (1977).

As the result of its investigation, Congress was fully aware that EPA's implementation of the 1977 limitations had caused and would continue to cause significant economic dislocation, including the closure of individual point sources. See, *e.g.*, 3 Cont. Leg. Hist. 269, 323, 324, 368, 373, 403, 404, 410-411, 496, 534-535, 541-544; 4 Cont. Leg. Hist. 850, 1197, 1430-1432; S. Rep. No. 95-370, *supra*, at 2 (reprinted at 4 Cont. Leg. Hist. 636); *Federal Water Pollution Control Act Amendments of 1977*, *supra*, Part 1, at 17-18; Part 2, at 106-107; Part 3, at 324-329; *Hearings on H.R. 3199*, *supra*, at 319-325. In fact, several industry representatives and legislators proposed that the 1977 limitations be amended or extensively delayed because "best practicable control technology may be impossible to attain or financially beyond reach in certain cases." 3 Cont. Leg. Hist. 542 (Sen. Schweiker). See *id.* at 324, 411-412, 541-544; 4 Cont. Leg. Hist. 1312-1315; *Federal Water Pollution Control Act Amendments of 1977*, *supra*, Part 1, at 19, 34; Part 3, at 324; Part 10, at 379, 719, 749, 753-755; *Hearings on H.R. 3199*, *supra*, at 319-325; Note, *The Clean Water Act of 1977: Great Expectations Unrealized*, 47 U. Cin. L. Rev. 259, 269 (1978). Nonetheless, except for extending the compliance deadline in special cases to April 1, 1979 (33 U.S.C. (Supp. I) 1319(a)(5)(B)),[30] Congress "resist[ed]

[30] See 3 Cont. Leg. Hist. 261, 390, 396-398, 402-403, 413, 414, 451; 4 Cont. Leg. Hist. 641, 1049-1050, 1054. In addition,

attempts to provide general exemptions or extensions for the 1977 deadlines." 3 Cont. Leg. Hist. 548 (Sen. Moynihan). See S. Rep. No. 95-370, *supra*, at 7-8, 44, 60-62 (reprinted at 4 Cont. Leg. Hist. 641-642, 677, 693-695); 3 Cont. Leg. Hist. 324, 411, 541-544; 4 Cont. Leg. Hist. 859-862, 881, 898-900, 1213-1214, 1270, 1312-1313, 1318.[31]

Finally, we submit that any doubts on this point must be resolved in favor of the remedial purposes of the statute and the agency's reasonable interpretation. Requiring EPA to consider the economic circumstances of all or even many industrial dischargers would impose a substantial administrative burden on the limited resources of the agency and would also further delay the implementation of the 1977 limitations. Such a broad economic variance clause might well render "the pin-hole safety valve envisioned in the Act and *duPont* * * * a yawning loophole." *Weyerhaeuser Co.* v. *Costle*, *supra*, 590 F.2d at 1040. In sum, the decisions of the courts of appeals, if affirmed, threaten the express congressional purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). See also Parenteau & Tauman, *supra*, 6 Ecol. L.Q. at 55.

Congress reemphasized that plants subject to closure because of financial inability to afford compliance are eligible for federal financial aid. See 3 Cont. Leg. Hist. 404.

[31] See also S. 2453 and H.R. 6867, 96th Cong., 2d Sess. (1980) (proposed bills to require EPA to modify effluent limitations if the limitations would have an adverse economic impact). See 126 Cong. Rec. S2656-S2657 (daily ed. Mar. 19, 1980).

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1980

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. Section 301 of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311, provides in pertinent part:

> (a) Except as in compliance with this section and sections [302, 306, 307, 318, 402, and 404 of this Act] 1312, 1316, 1317, 1328, 1342, and 1344 * * *, the discharge of any pollutant by any person shall be unlawful.
>
> (b) In order to carry out the objective of this [Act] there shall be achieved—
>
> > (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section [304(b) of this Act, 33 U.S.C.] 1314(b) * * *
> >
> > * * * * *
> >
> > (2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with

regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

* * * * *

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section [307 of this Act] 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A)

of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title [304(a)(4) of the Act] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; * * *

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

2. Section 304(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1314(b), provides in pertinent part:

(b) For the purpose of adopting or revising effluent limitations under this [Act] the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of

this title [October 18, 1972], regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section [301 of this Act] 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section [301 of this Act] 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

3. Section 434.22 of Title 40, Code of Federal Regulations, as promulgated by the Environmental Protection Agency on April 26, 1977, provides in pertinent part as follows (42 Fed. Reg. 21380, 21384):

In establishing the limitations set forth in this section, EPA took into account all information

it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

APPENDIX B

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 76-1690

Agency

[May 5, 1980]

ON PETITION FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY

[Illegible] LR19 * 76-1859, 76-1862, 76-1912, 76-1981 and 76-1982, 76-2019, 76-2020

Related cases: 76-2059, 76-2145, 76-2146, 76-2147, 77-1474, 77-1490, 77-1491, 77-1534, 77-1592, 77-1593, 77-1594, 77-1828, 77-1845, 77-1892, 77-1893, 77-1957, 77-2088, 77-1989, 77-1990

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DOUGLAS M. COSTLE, as Administrator, Environmental Protection Agency, RESPONDENT

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* Petitioning Industry Groups and Petitioning Environmental Groups allowed to file separate briefs.

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DATE OF JUDGMENT: May 3, 1976

DATE	FILINGS—PROCEEDINGS
6/25/76	Petition for review filed and cause docketed. jab
6/28/76	Notification, together with copy of petition, mailed certified mail to the respondent. jab
7/1/76	Appearance for the petitioner filed and entered. (foc)
7/6/76	Appearance for the petitioner filed and entered. (foc)
7/13/76	Appearance for the respondent filed and entered. (foc)
8/2/76	Motion of EPA to extend time to transmit the administrative record to 9/3/76, filed. epb
8/2/76	Order extending time to transmit the administrative record to Aug. 18, 1976, filed. epb
8/19/76	Certified List of EPA (Orig and 3) filed. jb
8/20/76	Briefing schedule established. jb
8/25/76	Motion to defer filing of appendix pursuant to R.30(c) FRAP, filed. Motion granted. epb
8/26/76	Motion to stay all proceedings along with a memorandum in support of the motion filed. Motion granted. epb
9/20/76	Joint motion to defer briefing until 40 days after respondent files his certified index to the record of the final effulent limitations guidelines appliacble to the coal mining point source category, filed. Motion granted. epb
12/27/76	Letter/motionof agency for extension of time to 3/31/77 to complete the review process and promulgate (final-final) regulations. MOTION GRANTED. (fls)
6/3/77	Certified Index to the Supplemental Record, *filed, 5/6/77.* jb
6/23/77	Order consolidating 76-1690, et al and establishing briefing schelule per LR 19, filed. jb

DATE	FILINGS—PROCEEDINGS

7/1/77 Order consolidating 77-1845 with 76-1690, et al and directing adhering to the briefing schedule already established, and allowing one brief for petitioning industries and one brief for petitioning environmental group, filed. jb

7/14/77 Order consolidating 77-1892 and 77-1893 with 76-1690, et al and directing that counsel adhaere [sic] to provisions of previously filed orders of 6/23/77 and 7/1/77, filed. jb

7/18/77 MOTION of the petitioners for lease to file deferred appendix per 30(c), FRAP, filed. (fls) MOTION GRANTED. (fls)

7/22/77 Petitioners' motion to extend time to file brief and appendix to 8/15/77, filed. MOTION GRANTED. (fls)

7/28/77 Orderconsolidating 77-1957 with 76-1690 pursuant to LR 19, filed. jb

8/5/77 Order consolidating 77-1989 and 77-1990 with 76-1690 pur LR 19 for briefing and arguing and applying provisions of previously filed orders in these cons. cases, filed. jb

8/17/77 Four (4) copies of the petitioner's brief filed. Joint with numbers 76-198 , 76-2146, 77-1592, 77-1845, 76-1859, 76-2019, 76-2147, 77-1593, 77-1892, 76- , 76-2020, 76-1474, 77-1594, 77-1893, 76-1912, 76-2059, 77-1490, 77-1534, 77- , 76-1981, 76-2145, 77-1491, 77-1828. (8-15-77 dmh).

8/22/77—Positive Local Rule 17 disclosure (Consolidation Coal Company), filed. dhb

8/17/77 Twenty Five (25) copies of petitioning Environmental Group's brief filed 8/15/77. (See 76-2020). jb

8/31/77 Order consolidating 77-2088 with 76-1690, et al, pursuant to LR 19, filed. jb

10/13/77 Twenty-five (25) copies of the petitioner's brief, Commonwealth of Penn. Department of Environmental Resources. (9-30-77 dmh).

DATE	FILINGS—PROCEEDINGS

10/17/77 MOTION of respondent for permission to file an enlarged brief not to exceed 100 pages of printing by process of duplication other than standard typographic printing, filed. (ecr) MOTION DENIED. (ecr)

11/4/77 Four (4) copies of the respondent's brief Jt. w/ 76-1859, et al., filed.

11/22/77 Nine (9) copies of the reply brief for Citizen Environmental Group Petitioner's filed. Consolidated with 76-1859 et al. (11-17-77 dmh).

11/22/77 Five (5) copies of the reply brief for Industry Petitioners filed. Consolidated with 76-1859 et al. (11-21-77 dmh).

11/25/77 MOTION of appellant to extend time to file deferred appendix to 12/5/77, filed. MOTION GRANTED. (fls)

11/25/77 Twenty-five (25) copies of the appellant's reply brief for the Commonwealth of Pa. filed. Jt. w/ 77-2088, et al. (PM 11-23-wtc)

12/12/77 Ten (10) copies of the joint appendix Volumes I, II, III, IV and a continued IV, filed. (HD 12/12-WTC)

12/12/77 Three folders as one lodged. (wtc)

12/22/77 MOTION of the industry petitioners for leave to file its initial brief 55 pages in length, filed. MOTION GRANTED. (fls)

12/22/77 25 copies Reply Brief for Industry petitioners filed. (12-19-77) dmh

12/22/77 25 copies of industry petitioners brief filed. (12-19-77) dmh

1/4/78 Respondent's motion for an extension of time to file printed briefs to 1/17/78, filed. MOTION GRANTED. (fls)

DATE	FILINGS—PROCEEDINGS
1/19/78	Twenty-five (25 copies of the respondent's brief filed. (1-17-78 dmh). PM cs.
1/19/78	Positive Local 17 disclosure (plaintiffs) filed. dhb
3/15/78	Respondent's MOTION to file a supplemental brief, filed. (ecr)
3/21/78	Response to EPA's motion to file a supplemental brief, filed. (fls) Transmitted to JDB, HEW, KKH.
3/23/78	ORDER allowing Doulgas M. Costle, Administrator, etc. to file a supplemental brief and permitting the industry petitioner to file a response to the brief by March 27, 1978, filed. ecr Certified copies to all counsel.
3/22/78	Supplemental brief of respondents, filed. ecr (25 copies)
3/28/78	Four (4) copies of the Industry Petitioners' Brief in reply to respondent's supplemental brief filed. (3-28-78 dmh). HD.
3/29/78	Twenty-five (25) copies of the Industry Petitioners' brief in reply to respondent's supplemental brief filed. (3-27-78 dmh). PM.
10/5/78	Cause came on to be heard before Butzner, Widener and Hall, Circuit Judges, was argued by counsel and submitted. (jhl)
6/25/79	Opinion filed. JDB P (wu)
6/25/79	Opinion and Notice mailed to counsel of record. (wu)
6/25/79	Decree filed. Petition to set aside denied; regulations on variances remanded. (wu)
7/9/79	MOTION (C-70) of P for clarification of opinion, filed. (jeh) Transmitted to JDB, HEW, KKH
7/12/79	MOTION (C-85) of Respondent for stay of mandate filed. Transmitted to JDB, HEW & KKH. mjk

DATE	FILINGS—PROCEEDINGS
7/20/79	Memorandum of respondent (C-70) in opposition to P's motion for clarification, filed (jeh)
7/31/79	Response of (C-70) Industry Petitioners to various post-decision submittals, filed (jeh) Transmitted to JDB, HEW, KKH.
7/31/79	Response of the Commonwealth of Pennsylvania to various post-decision submittals, filed (jeh) Transmitted to JDB, HEW, KKH.
8/10/79	ORDER denying motion for clarification, filed. (fls) Copy to all counsel of record. (also denying motion for stay)
8/28/79	Certified copy of judgment & printed copy of opinion transmitted to EPA. jhl
10/30/79	Letter of request for the lodged materials with the court and returned to Michael B. Barr three file folders. WTC
12/18/79	Notice evidencing the filing petition for writ of certiorari in the Supreme Court November 15, 1979 filed. (No. 79770) (jhl)
2/26/80	Certified copy of order of the Supreme Court granting certiorari February 19, 1980 filed. (jhl)

Theodore L. Garrett/secty

D.C.: 452-6000

76-1914

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 76-1914

Agency

ON PETITION FOR REVIEW OF AN ORDER OF THE
ENVIRONMENTAL PROTECTION AGENCY

Related: 76-1915, 76-1929, 76-1930, 76-2197
Consolidated:

NATIONAL CRUSHED STONE ASSOCIATION, INC.,
and LUCK QUARRIES, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Attorneys for Petitioners

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DATE OF JUDGMENT: June 10, 1976

DATE	FILINGS—PROCEEDINGS
8/23/76	Petition for review filed and cause docketed. jab
8/24/76	Notification along with a copy of the petition for review mailed certified mail to the respondent. jab
9/3/76	Petitioners appearance filed and entered. (foc)
9/15/76	Order consolidating cases for oral argument filed. (76-1914, 76-1915, 76-1929, 76-1930). epb
9/22/76	Motion of Sarasota County, Fla, for leave to intervene filed. epb
9/27/76	Joint motion for deferral of proceedings pending completion of proceedings before the agency to March 31, 1977, filed. MOTION GRANTED. (fls)
9/29/76	Respondent's opposition to motion of Sarasota County, FL for leave to intervene, filed. (fls)
9/30/76	Reply of Sarasota County, Florida to respondent's opposition to motion of Sarasota County, Florida for leave to intervene filed crl
10/7/76	Motion, opposition to motion and reply to opposition transmitted to SLC.
10/15/76	Appearance for the respondent filed and entered. (foc)
11/12/76	Respondent's motion to consolidate this case with case numbers 76-1914, 1915, 1929, and 1930, for the purpose of briefing and oral argument, filed. epb
11/12/76	Order consolidating case no. 76-2197 with case nos. 76-1914, et al, filed.
12/23/76	Appearance for EPA filed and entered. (foc)
1/19/77	Motions, responses and suggested order transmitted to Judges Butzner, Boreman and Russell. (MFN/vsl)
2/22/77	ORDER denying motion of Sarasota County for leave to intervene, filed. Certified copies mailed to Scott and Taft-Graves-Ghiorzi, and Breckenridge. (fls)
3/28/77	MOTION of respondent for deferral of proceedings pending completion of proceedings before the agency, filed. (ecr)

DATE	FILINGS—PROCEEDINGS
4/11/77	Motion for deferral of proceedings pending completion of proceedings before the agency and a copy of a letter from counsel for the petitioners transmitted to HSB, JDB, DSR. (ecr)
4/13/77	ORDER granting motion to defer proceedings until May 31, 1977, filed. (ecr) Certified copies to Scott, Taft, Graves, Ghiorzi, Breckenridge, Dunkelber, Garrett, Eckert, Stephens, Rhodes, Clark, Hall.
5/19/77	MOTION for deferral proceedings pending completion of proceedings before the agency, filed. (ecr)
5/27/77	ORDER granting the motion to defer proceedings pending completion of proceedings before the agency to July 1, 1977, filed. (ecr) Certified copies to Scott, Taft, Graves, Ghiorzi, Breckenridge.
6/7/77	Appearance of Ackerly and McClure for petitioners filed and entered. mjk
7/5/77	MOTION for deferral of proceedings to August 1, 1977, filed. (ecr) MOTION GRANTED. (ecr)
7/29/77	Joint motion for deferral of proceedings until 9/15/77, filed. MOTION GRANTED. (fls)
8/5/77	Response to motion of Agrico Chemical Co. for deferral of proceedings, filed. (ecr)
9/8/77	Appearance of Garrett for petitioner filed and entered. mjk
5/11/78	ORDER allowing the petitioners and respondent to file supplemental briefs, filed. (fls) Certified copy of order mailed to Garrett-Dunkelberger; Rogers-Eckert; Taft-Brandon-Ghiorzi.
5/11/78	Supplemental brief of petitioners, filed. (fls)
5/11/78	Supplemental brief of respondent, filed. (fls)
8/8/78	Record of proceedings before EPA in three boxes, filed. jb
8/8/78	Record above mailed to Judge Widener. jb
6/13/79	Record on appeal in five boxes received from Judge Widener/ (jhl)

DATE	FILINGS—PROCEEDINGS

6/18/79 Opinion remanding regulations to Agency filed. HEW P (wu)

6/18/79 Opinion and Notice mailed to counsel of record. (wu)

6/18/79 Decree filed.

7/11/79 Certified copy of the decree and printed copy of the opinion forwarded to EPA. (jhl)

8/1/79 RESPONSE of petitioners to EPA motion to recall mandate which was filed with papers in no. 76-1690, et al, filed. (fls)

7/12/79 MOTION of EPA for stay of mandate in Nos. 76-1690 et al and *for recall of mandate in 76-1914 et al* filed. plm

8/8/79 SUBMITTED to CHF/DR/HEW motion for recall of mandate and the response thereto. plm

8/3/79 RESPONSE of petitioner to EPA's motion for recall of mandate, filed. (fls) Transmitted to CHF/DR/HEW.

9/4/79 ORDER denying motion of EPA to recall the mandate, filed (jeh) Copy to Garrett, Dunkelberger; Brandon, Taft, Ghiorzi; Rogers, Breckenridge, Eckert.

12/18/79 Notice evidencing the filing petition for writ of certiorari in the Supreme Court November 15, 1979 filed. (No. 79-770) (jhl)

12/26/80 Certified copy of order of Supreme Court granting certiorari February 19, 1980 filed. (jhl)

3/13/80 Certified record in three volumes transmitted to the Clerk of the Supreme Court. (Proceedings in Court of Appeals plus two copies of Appendix (Volumes one and two))

3/17/80 Record of proceedings before EPA in six boxes (6) returned to Roland Kirby.

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